(2) (2) (2)

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-120, 89-122, and 89-123

# In the Supreme Court of the United States

OCTOBER TERM, 1989

SOUTHERN NATURAL GAS COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

PARKER TOWING COMPANY, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
ROBERT S. GREENSPAN
PETER R. MAIER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

13 pp

## QUESTION PRESENTED

Whether the court of appeals erred in overturning as clearly erroneous the district court's determination that the United States Army Corps of Engineers' operation of lock and dam facilities on the Black Warrior River in Alabama was the proximate cause of the damages incurred by petitioners.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 10 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985) | 6, 9 |
| *Just* v. *Chambers*, 312 U.S. 383 (1941) | 10 |
| *Levinson* v. *Deupree*, 345 U.S. 648 (1953) | 10 |
| *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948) | 6, 9 |


Statutes and rule:


| | |
|---|---|
| Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* | 4 |
| 33 U.S.C. 702c | 2 |
| Fed. R. Civ. P. 52(a) | 9 |

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-120

SOUTHERN NATURAL GAS COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 89-122

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 89-123

PARKER TOWING COMPANY, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 864 F.2d 1550.[1] The district court's findings of fact and conclusions of law (Pet. App. A13-A45) are unreported.

---

[1] "Pet. App." refers to the appendix to the petition in No. 89-120.

## JURISDICTION

The judgment of the court of appeals was entered on February 6, 1989. Petitions for rehearing were denied on April 25, 1989 (Pet. App. A46). The petitions for a writ of certiorari were each filed on July 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The United States Army Corps of Engineers operates a system of four lock and dam facilities on the Black Warrior River in and around Birmingham and Tuscaloosa, Alabama. The Corps of Engineers uses these "run-of-the-river facilities" to facilitate navigation on the river; the facilities are neither designed nor used for flood control.[2] See generally 33 U.S.C. 702c. Pet. App. A4-A5, A14-A20.

During the evening and early morning of December 2 and 3, 1983, "an unprecedented rainfall in the area of Birmingham and Tuscaloosa, Alabama" caused the level of the nearby Black Warrior River to rise rapidly, thereby creating severe flood conditions. Pet. App. A20. On that night, three towboats owned by petitioner Warrior & Gulf Navigation Company—the *Muskogee,* the *Apalache,* and the *Caddo*—were proceeding downstream toward the Holt Lock. Each of these vessels was pushing six loaded coal barges. Meanwhile, another Warrior & Gulf towboat, the *Tahome,* was proceeding upstream with six empty barges. Pet. App. A6, A21-A22.

As the *Caddo* travelled down the river, it collided with the Highway 82 Bypass Bridge, which spanned the river

[2] The facilities on the Black Warrior River include the Bankhead Lock and Dam, the Holt Lock and Dam (roughly 18 miles downstream of Bankhead), and the Oliver Lock and Dam (roughly 8.5 miles downstream of Holt at Tuscaloosa). See Pet. App. A15-A20.

some five miles below the Holt Lock. The collision broke up the *Caddo*'s six-barge tow; five of the barges floated free, the sixth sank. The *Caddo* radioed for help. The *Apalache* and the *Tahome,* which were above the Oliver Lock, responded to the call and proceeded upstream. Eight loaded barges (two from the *Muskogee,* which had proceeded below the Oliver Lock, and all six of the *Apalachee*'s), and two empty barges (from the *Tahome*) were left moored, but unattended, just above the Oliver Lock. Pet. App. A6-A7, A21-A22.

While the *Caddo, Apalache,* and *Tahome* worked to retrieve the *Caddo*'s tow, all eight of the loaded barges moored above the Oliver Lock broke loose and proceeded downstream over the top of the Oliver Dam. These runaway barges then struck and broke loose the four loaded barges (the remainder of the *Muskogee*'s tow) that had been moored below the Oliver Lock. The drifting Warrior & Gulf barges then struck and damaged a tow being pushed by the *Thelma Parker,* which was owned and operated by petitioner Parker Towing Company, Inc. Pet. App. A7, A22-A23.

Twelve of the loaded Warrior & Gulf barges ultimately sank. But first, one or more of the barges drifted into the Hunt Oil Company Dock, located downstream from the Oliver Lock at the Tuscaloosa refinery. The barge (or barges) then ruptured, severed, and separated two submarine gas pipelines running across the river; petitioner Southern Natural Gas Company owned these pipelines. Pet. App. A7, A22-A23.

In a separate incident occurring on the Black Warrior River on the night of December 2, a loaded barge owned by petitioner Parker Towing Company, which was moored above the Holt Lock, broke loose and drifted into the spillway gates of the Holt Dam. Although the barge did not damage the dam, it prevented the Corps of Engi-

neers from closing three of those gates. Parker Towing promptly abandoned the barge to the United States. About one week later, however, as the Corps of Engineers was lowering the level of Holt Lake in order to remove the barge, another Parker Towing barge, which was in the area, grounded on the lake bottom and fractured in the middle. Pet. App. A7-A8, A23-A24.

2. Petitioners filed separate actions against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, in the United States District Court for the Southern District of Alabama. Each petitioner alleged that, during the rainstorm on December 2 and 3, 1983, the Corp of Engineers had negligently operated the lock and dam facilities on the Black Warrior River, and that this mishandling proximately caused the damages incurred, namely, the sunken and fractured barges and the severed pipelines.[3] The district court consolidated the actions and, in September 1986, held a bench trial limited to the issue of liability. Pet. App. A4, A13; Gov't C.A. Br. 2-3.

3. The district court concluded that the Corps of Engineers' negligent operation of lock and dam facilities on the Black Warrior River was the proximate cause of the damages incurred by petitioners. Pet. App. A13-A45. The district court found, among other things, that the Holt and Bankhead facilities were part of a system of locks and dams operated by the Corps of Engineers, one purpose of which was to "provide a navigable channel in the Black Warrior River two hundred feet wide and nine feet deep." *Id.* at A15. The court further found that the Corps of Engineers had negligently operated Holt and Bankhead on

---

[3] The United States filed a separate action against petitioner Parker Towing Company for the salvage costs of the barge abandoned in Holt Dam. The district court denied that claim. See Pet. App. A44. The United States sought no review of that ruling. See *id.* at A12 n.10.

the night of December 2, because, in response to a rapidly rising river, the Corps had not sufficiently opened the spillgates to counteract the rise of the river and its increased velocity. See *id.* at A26-A38.

The district court then found that the Corps of Engineers' negligence created a "sudden increase in current" below the Holt Dam, which caused the *Caddo* and its tow to collide with the Highway 82 Bypass Bridge. Pet. App. A41; see *id.* at A35-A38. The court found that "[t]he damages claimed by [petitioners] all stem from the domino effect of the CADDO's tow colliding with the * * * Bridge and its break-up." *Id.* at A43. Since the Corps of Engineers was responsible for the initial collision, the court concluded that it was solely liable for all the resulting damages. The court refused to consider whether each petitioner's damages could be attributed to an intervening cause, such as leaving barges unattended on the river. In the court's view, that issue "is of no import" because "[a]ll parties, save the United States, have settled with [petitioner Warrior & Gulf]." *Id.* at A43-A44.[4]

The district court also refused to excuse the Corp of Engineers from liability "on the premises that the losses suffered by [petitioners] were the result of an Act of God for which the Government is not responsible." Pet. App. A44. Having found "human error in the operation of the gates," the court concluded that "the Govesnment has not sustained its burden of proof entitling it to exoneration on this theory." *Id.* at A45.[5]

---

[4] The court of appeals noted this inaccuracy in the district court's opinion. Parker Towing Company had not settled its claim against Warrior & Gulf. See Pet. App. A11 n.9; Gov't C.A. Br. 4 n.1.

[5] The district court also refused to enforce the release from liability contained in "Clause No. g." of the permits issued by the Corps of Engineers to petitioner Southern Natural Gas Company and Hunt Oil Company for the construction of the structures that were damaged

4. The court of appeals unanimously reversed, holding that "the district court clearly erred by concluding that the actions of the United States were the proximate cause of the *CADDO* casualty and, thus, of all the damages suffered by [petitioners]." Pet. App. A8. It first recognized that the district court's proximate cause finding was subject to a narrow standard of review—"whether that finding is clearly erroneous." *Id.* at A9 & n.5 (citing *Anderson* v. *City of Bessemer City,* 470 U.S. 564, 573 (1985), and *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948)).[6]

Turning to the record, the court of appeals agreed with the district court's finding that "the excessive rain on the night of December 2d and in the morning of December 3, 1983, was unprecedented." Pet. App. A9-A10. In this regard, the court analogized the unprecedented rainfall to the "act of God principle," which "applies only to events

---

(submarine pipelines and the dock). That clause provides in pertinent part:

> [T]he United States shall in no case be liable for any damage or injury to the structure or work herein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes and no claim or right to compensation shall accrue from any such damage.

Gov't C.A. Br. 32. In finding this clause inapplicable, the court concluded that the damage sustained by Southern and Hunt "was not a result from future operations undertaken by the Government for the conservation or improvement of navigation or other purposes." Pet. App. A43 (internal quotation marks omitted).

[6] The court described that standard of review as follows:

> A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Pet. App. A9 (internal quotation marks omitted).

in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Id.* at A9 (internal quotation marks omitted). The record also made plain that

> [t]he Black Warrior River lock and dam system is not a flood control project; rather, this system is comprised of run-of-the-river facilities. As such, the lock and dam facilities are not designed to accommodate flood waters or to alleviate flooding. The function of the run-of-the-river dams simply is to pass downstream all inflow in excess of that necessary to provide the advertised navigational depth in each dam's upper pool.

*Id.* at A10. The district court, however, had improperly ignored these critical facts. The record further showed that, during the "critical period [on December 2 and 3], as more water moved down the river as a result of the unprecedented rain, more water was released over the dam, i.e., the flow out of the dam was matching the flow into the lake above the dam." *Ibid.*

After "a thorough review of the record," the court of appeals concluded that it was "left with the definite and firm conviction that the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case." Pet. App. A10. The court of appeals therefore held that the district court "clearly erred by determining that the actions of the United States were the proximate cause of the damages incurred by [petitioners] * * *." *Id.* at A11.[7]

---

[7] In light of this disposition, the court of appeals did not address the government's contention regarding the release of liability issued to

## ARGUMENT

The court of appeals' decision correctly applies well-settled law governing the review of lower court findings under the "clearly erroneous" standard of review. At bottom, petitioners dispute the court of appeals' assessment of the record evidence on the issue of proximate cause. Further review of petitioners' fact-specific claims is unwarranted.

1. Petitioners principally contend (89-120 Pet. 14; 89-122 Pet. 9-11; 89-123 Pet. 21-32) that the court of appeals erred in setting aside as clearly erroneous the district court's determination that the Corps of Engineers' negligent operation of the lock and dam facilities was the proximate cause of the damages incurred by petitioners. As the court of appeals made clear, however, the district court incorrectly discounted the relevance of several critical factors, particularly the relationship of the unprecedented rainfall to the functions and operations of river's lock and dam system. See Pet. App. A9-A10. Upon a thorough review of the record, the court of appeals thus correctly determined that the premise of the district court's proximate cause finding—that the Corps of Engineers could have operated the lock and dam system to avoid creating the flood conditions that caused the *Caddo*'s accident—was wrong. To the contrary, the record showed that the lock and dam system was neither designed to prevent, nor capable of stemming, the enormous flow of water caused by the sudden rainfall. See *Ibid.*

As the court of appeals determined, a review of the entire record confirmed that the unprecedented rainfall,

---

petitioner Southern Natural Gas Company. See note 5, *supra*.

Finally, the court of appeals remanded the case for further proceedings on Parker Towing Company's claim against Warrior & Gulf. See Pet. App. A11-A12.

which created treacherous navigation conditions, not any mishandling of the lock and dam system by the Corps of Engineers, was responsible for setting in motion the various accidents that led to petitioners' damages.[8] The court of appeals was " 'left with the definite and firm conviction that a mistake has been committed.' " *Anderson* v. *City of Bessemer City,* 470 U.S. at 573 (quoting *United States* v. *United States Gypsum Co.,* 333 U.S. at 395). The court of appeals' correct assessment of the record evidence does not warrant further review.[9]

2. Petitioner Warrior & Gulf also contends (89-122 Pet. 18-23) that the court of appeals erred in referring to Alabama state court decisions in determining whether the extraordinary rainfall, rather than the Corps of Engineers' operation of the dam and locks, proximately caused the accidents. That contention is groundless. First, the issue has only limited significance in the context of this case, because the crux of the court of appeals' judgment is that the record does not support the finding that any action taken by the Corps of Engineers was a proximate cause of peti-

---

[8] Petitioner Southern Natural Gas Company notes (89-120 Pet. 26) that the district court's determination of negligence in the operation of the system was based on findings of negligent failure to warn as well as negligent operation of the spillway gates. But in any event, the court of appeals concluded that the unprecedented rain "rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system was the *inevitable* cause of the chain of events in this case." Pet. App. A10 (emphasis added).

[9] The court of appeals applied the settled construction of Fed. R. Civ. P. 52(a), which this Court most recently described in *Anderson* v. *City of Bessemer City, supra.* Despite Southern Natural Gas Company's suggestion (Pet. 14-24), this case therefore does not present an occasion for this Court to revisit the issue of appellate review of trial court findings of fact.

tioners' damages.[10] Second, this Court has long acknowledged that the general maritime law of the United States, which petitioners concede governs this case, includes the pertinent decisions of both state and federal courts. See, *e.g., Levinson* v. *Deupree,* 345 U.S. 648, 651-652 (1953); *Just* v. *Chambers,* 312 U.S. 383, 387-392 (1941).

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
ROBERT S. GREENSPAN
PETER R. MAIER
*Attorneys*

SEPTEMBER 1989

[10] For that reason as well, petitioners' contention (89-120 Pet. 24-27; 89-122 Pet. 11-12) that the court of appeals misconstrued Alabama law with respect to the Act of God defense does not call for this Court's review.

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00519